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Department of Justice

Washington
20530

Honorable Lawrence R. Houston
General Counsel
Central Intelligence Agency
Washington, D. C. 20505

Dear Mr. Houston:

We have considered the proposed "Contract of Rights to Information" accompanying your letter of February 19, 1968 and welcome this opportunity to discuss its provisions with you.

The first paragraph in effect cancels all present contracts of employment and requires the employee to agree to the new use of information conditions or terminate his employment with the Agency. Assumedly the exercise of this power by the Director would violate no present job rights of the employees.

We of course do not know whether any present or former employee intends to publish in the future, but we can surmise that a present employee may be prompted to resign or retire now in the belief that the restrictive covenants would not thereby apply to him. Former employees can be expected to contend that unclassified information derived from employment with the Agency can be properly utilized without Agency consent if the employee has not personally agreed to refrain from using such information.

We assume you have already considered the risk that the contract would be construed as creating new, rather than confirming existing, Agency rights and employee obligations but that on balance you believe the Agency's best interests in the long run would be better protected with a contract than without one.

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? The second paragraph of the contract should be deleted. To require an employee to agree to keep classified information "forever secret" is unnecessary. He already has that obligation so long as the information remains classified. If it is intended to preclude the employee from using this information without prior Agency approval after it has been declassified, we question both its reasonableness and its constitutionality. If the information on declassification becomes in the public domain, there is no reason to preclude its use by anyone. If the information on declassification becomes "unclassified information derived from Agency employment", there is no reason why the limitations as to unauthorized use of Agency property specified in paragraph four below should not automatically apply.

On the other hand if the purpose of paragraph two is to allow an employee to have classified information declassified for his personal benefit, the integrity of and necessity for all of the Agency's classification actions may be called into question. We would not want the Agency to precipitate judicial examination into the need for classification of any security information or to invite charges of Agency favoritism. It is not hard to imagine competing publishers finding an improper motive for every Agency declassification action taken under paragraph two for the benefit of a particular publisher and alleging discrimination for every refusal by the Agency to declassify information of interest to that publisher or to the press generally.

? The third paragraph should not be, or seem to be, the legal predicate for the Agency's proprietary interest in classified and unclassified information deriving from Agency employment. The basis should be asserted elsewhere so that the interest will exist independently of the contract. The contract can and should reference the independent basis but this interest should exist and be operative even if by administrative error the employee fails to execute the contract.

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The fourth paragraph causes the greatest difficulty because "unclassified information deriving from Agency employment" does not readily fit established trade secrets concepts, but the problem can be lessened if the restriction against unauthorized release is limited to specified types of unclassified information not in the public domain of obvious interest and concern to the Agency.

The present contract language seems overly broad, especially if interpreted to prohibit the publication or dissemination of any materials of whatever kind based upon unclassified information which the employee "happened to acquire in the course of his employment."

There must be a more precise definition of the property sought to be protected. A mechanical test for non-disclosure predicated solely on the employment relationship will probably not withstand First Amendment scrutiny. The property to be protected must not only be precisely defined but limited to information clearly in need of protection from non-disclosure. This is especially true where the contract is a standard form of general applicability. If broader coverage is needed for a particular undertaking, the contract with respect to that individual should be tailored to meet the needs of that enterprise. The need for the greater limitation should appear in the document itself so that if the individual contract is later ruled unenforceable, the ruling may not affect the continuing validity of the standard agreement. If a separate contract is not feasible, the need for secrecy would probably justify some degree of classification to remain in effect for as long as the special need for non-disclosure of the information continued.

American public policy abhors denying an individual the use of his personal skills, knowledge and experience even though the matter be of great value and secret as

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well. Thus courts have repeatedly refused on public policy grounds to enforce contracts seeking to restrain an employee from using knowledge and skills learned or improved in the course of employment. The law does not require the employee to make a tabula rasa of his mind, by erasing from it knowledge he has acquired.

The dictionary defines information as knowledge given or acquired. Thus the contract could be interpreted as prohibiting an employee who learned to operate a certain camera in connection with his work from subsequently offering for publication or display any photograph taken with a similar camera of his own even though the object of this photography were entirely unrelated to his work. Similarly if he learned French or some other language as part of an employee education program, he could not under the terms of the proposed contract subsequently put this knowledge to use even in writings unrelated to the Agency's business. To prevent such constructions we suggest the use of explicit categories of covered information, such as (1) information involving intelligence activities or identification, (2) information involving communications or negotiations with foreign governments or international organizations, (3) information which would embarrass or needlessly offend an international organization, foreign government or official thereof, and (4) information the disclosure of which would hamper the operation of the Agency. While still somewhat general in description, these categories and others of like content you may decide to use, specified in a contract would not only more readily suggest their need for protection from unauthorized disclosure but would provide greater certainty and narrower scope than the presently rather sweeping language of the draft paragraph.

We also have some reservations about the reasonableness and constitutionality of the fifty year ban against unauthorized disclosure of unclassified information. We agree that some automatic release date is desirable, but believe that fifty

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years would be hard to justify in the First Amendment area. In the absence of some practical formula devising a reasonable time period we believe an automatic ten year limitation would be more readily sustainable. If longer periods are necessary to protect particular items of information, here again the need would probably justify some degree of classification to remain in effect on a clear determination of necessity for as long as disclosure would endanger the national security.

The fifth paragraph of the proposed contract should be amended to make clear that the Government's interest is not limited to the receipt of royalties or money damages where the employee violates the terms of the contract. In a proper case, it may be necessary in order to protect the Government's interest to enjoin publication in violation of the information contract; and the contract as it now stands would seem to indicate that the Government was mainly interested in protecting claims for royalties.

Of course injunction may be an illusory remedy in many cases because of the problems in drafting a sufficiently specific injunction without revealing the very thing sought to be protected from disclosure. Even so, the inclusion of a reference to possible injunctive relief may serve as a deterrent to wilful breach of contract or unauthorized use of writings.

A second problem lurking in the assignment of royalties provision arises out of the fact that no copyright may subsist in any publication of the United States Government. (17 U.S.C. 8) A government publication is defined as a work which is prepared by a government employee as part of his official duties. Public Affairs Associates, Inc. v. Rickover, 268 F. Supp. 444, 448 (D.D.C. 1967). Since

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this contract attempts to regulate as a part of the employment relationship the writings of Agency employees, it may be that such writings, since they are controlled by the employer, would be construed by the courts to constitute "government publications" and, hence, in the public domain and republishable by anyone without violating a copyright. Therefore, while the assignment of royalties would be valid and perhaps effective against the employee who violates the contract, it may not operate as a deterrent to republication by third parties if the contract is violated.

The confession of judgment provision in paragraph five also appears to be so broad and encompassing as to be of doubtful validity. An all-inclusive advance confession of wrongdoing by the employee embracing any breach of the terms of the contract is so basically unfair and unreasonable that courts would likely condemn the whole contract as offensive to public policy. Under a blanket confession of judgment provision there could never be an independent adjudication of a good faith dispute.

Public policy may give employees the right to have an impartial determination of their constitutional rights, and a contract provision which unreasonably limits the exercise of a constitutional right may render the whole contract unenforceable. We therefore suggest that the confession of judgment provisions be eliminated from the agreement. In its place we suggest the inclusion of an arbitration provision. An arbitration provision in the contract serves at least two purposes. It offers greater protection of the secrecy of the matter under consideration by avoiding at least temporarily and possibly permanently its declassification for court action and it is more likely to survive a court test than a procedure calling for an ex parte determination of rights and liabilities by the employer alone.

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The sixth paragraph should not be, or seem to be, the basis of the Agency's interest in, or of employee's duty to return, the items enumerated at the termination of the employment relationship. The basis should be independent of the contract for the same reasons specified in connection with the proprietary interest discussed above with respect to paragraph three. The contract can and should reference the independent basis but the interest and duty should separately exist and be operative even if by administrative error the employee fails to execute the contract. A separate basis may also eliminate any need to trace possession through the former employee under the contract to recover Agency property in the hands of third parties.

The seventh and eighth paragraphs highlight the problems discussed in connection with the first paragraph, namely, the chance that the contract will be deemed to create new rights and obligations not applicable to former employees not parties to the contract.

Should you desire, we will be happy to meet with you at any time in order to further discuss the proposed contract.

Sincerely,

J. WALTER YEAGLEY
Assistant Attorney General
Internal Security Division

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Janet - extra copy

15 February 1968

The Honorable J. Walter Yeagley
Assistant Attorney General
Internal Security Division
Department of Justice
Washington, D. C. 20530

Dear Walt:

Pursuant to the interagency meeting of 29 January 1968 (attended by representatives of the Department of State, Department of Defense, Department of Justice, Atomic Energy Commission and Central Intelligence Agency), where it was suggested that coordination in the matter of security leaks be implemented, I am forwarding to you two items. The first is a proposed "Contract of Rights to Information" which, if utilized, would make it economically unrealistic for a person employed under it to attempt to profit financially by releasing classified information. The second item is a draft revision of 50 U.S.C. 783(b). (The present language of 50 U.S.C. 783(b) is also enclosed.) This revision will make it a crime for anyone to release classified information to any unauthorized person, changing the existing law, which makes illegal only the act of passing classified information to an agent of a foreign government.

Neither of these items contains the full protection which each of the interested organizations would probably desire, but total protection appears not to be constitutionally feasible. To obtain a successful conclusion to litigation under either a statute or a contract, it is apparent that declassification for purposes of a trial would probably be necessary. However, it is felt that deterrents which would require declassification are better than the present system which affords no protection at all.

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Your comments and recommendations on these items would be appreciated.

Sincerely,

9/ Lawrence R. Houston
Lawrence R. Houston
General Counsel

Enclosures

Inked note on original only - Also thanks for the material you sent me recently.

OGC:TNT:bt

Distribution:

Orig. - Adse.

1 - SECURITY Subject file

1 - TNT Signer

✓ 1 - Chrono

cc: Jared Carter
Special Asst. to Legal Advisor
Department of State

Robert L. Gilliat
Office of Asst. General Counsel for
Manpower & Reserve Affairs
Department of Defense

Joseph J. Liebling
Director for Security Policy
Department of Defense

Howard C. Brown
Assistant General Manager
Atomic Energy Commission

Franklin N. Parks
Associate General Counsel
Atomic Energy Commission

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CENTRAL INTELLIGENCE AGENCY
CONTRACT OF RIGHTS TO INFORMATION

This contract entered into this _____ day of _____,
19____, between the Central Intelligence Agency (hereinafter called
"CIA") and _____ (hereinafter called
"Employee").

WITNESSETH

1. CIA agrees to (continue to) employ Employee under such terms and conditions as the parties may agree and in accordance with CIA employment policies and subject to the availability of funds. This contract shall not preclude CIA from terminating Employee for cause, because of a Reduction in Force, because of an insufficiency of funds, or for any other reason or purpose, on the sole determination of CIA. In particular this contract does not and is not intended to negate or impair the authority of the Director of Central Intelligence under Section 102(c) of the National Security Act of 1947, as amended (50 U.S.C. 403).

2. Employee agrees to keep forever secret all classified information derived from his employment by CIA, except to the extent that he may be authorized in writing by an authorized representative of the Director of the CIA to reveal any such information.

3. Employee agrees that all information, classified and unclassified, deriving from his employment by CIA is the property of CIA.

4. Employee agrees he will not, before the date which is fifty years after his employment by CIA terminates, publish, publicize, record, sell, or in any other way disseminate any unclassified information deriving from such employment, or any work based in whole or in part on, or which utilizes, any such information, without the prior written approval of CIA. Without such prior written approval the Employee will take no action designed or intended to accomplish any of the foregoing, nor will he do anything to assist any other person to take any such action based on or utilizing information acquired by Employee and derived from such employment.

5. Employee hereby assigns to CIA all right, title and interest in any royalties and remunerations of any nature which

may inure to the Employee because of any action in breach of this contract. Should any litigation of any kind arise out of such action, Employee hereby confesses judgment in favor of the United States Government.

6. Upon termination of employment of Employee by CIA, Employee shall promptly deliver to CIA all documents, papers, notes, notebooks, reports, drawings, maps, tapes, and all other material and information of any nature relating to CIA which Employee has in his possession or has acquired as a result of his employment with CIA.

7. The term "employment" herein applies with respect to the periods of employment by CIA prior to the date of this contract, as well as periods subsequent to that date.

8. This contract is effective as of _____, 19____.

Draft Revision of 50 U.S.C. 783(b)
Communication of Classified Information
by Government Officer or Employee

It shall be unlawful for any officer or employee of the United States, or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States, or any department or agency thereof, to communicate or attempt to communicate in any manner or by any means to any unauthorized person or persons any information of any kind whatsoever which shall have been classified by the President (or by the head of any such department, agency or corporation with the approval of the President) as affecting the security of the United States, knowing or having reason to know that such information has been so classified, unless such officer or employee shall have been specifically authorized by the President, or by the head of the department, agency or corporation by which this officer or employee is employed, to make such disclosure of such information.

distinguishable unit, and (B) the forcible suppression of opposition to such party.

(16) The term "doctrine" includes, but is not limited to, policies, practices, purposes, aims, or procedures.

(17) The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be conclusively presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

(18) "Advocating the economic, international, and governmental doctrines of world communism" means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.

(19) "Advocating the economic and governmental doctrines of any other form of totalitarianism" means advocating the establishment of totalitarianism (other than world communism) and includes, but is not limited to, advocating the economic and governmental doctrines of fascism and nazism. Sept. 23, 1950, c. 1024, Title I, § 3, 64 Stat. 989.

§ 783. Offenses—(a) Conspiracy or attempt to establish totalitarian dictatorship

It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

Communication of classified information by Government officer or employee

(b) It shall be unlawful for any officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, to communicate in any manner or by any means, to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government or an officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, knowing or having reason to know that such information has been so classified, unless such officer or em-

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employee shall have been specifically authorized by the President, or by the head of the department, agency, or corporation by which this officer or employee is employed, to make such disclosure of such information.

Receipt of, or attempt to receive, by foreign agent or member of Communist organization, classified information

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

Penalties for violation

(d) Any person who violates any provision of this section shall, upon conviction thereof, be punished by a fine of not more than \$10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

Limitation period

(e) Any person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after the commission of such offense, notwithstanding the provisions of any other statute of limitations: *Provided,* That if at the time of the commission of the offense such person is an officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, such person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after such person has ceased to be employed as such officer or employee.

Membership as not violation per se; registration as inadmissible in evidence

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under

Tit. 50 U.S.C.A.—29

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OGC 70-1766

19 October 1970

MEMORANDUM FOR: Deputy Director for Support

SUBJECT: Employee Publications

25X1 1. Attached is a Memorandum for the Record by Mr. [] suggesting that there be included in the current secrecy agreement signed by employees an assignment of all rights to royalties for articles, books and other materials authored by the employee. Clearly, such an assignment would give the Agency a valuable tool in coping with attempted publications in the future. Whether we should obtain such an assignment is a matter of policy. From the standpoint of the Office of General Counsel we would like to have such tools since, when the chips are down, Justice would rather rely on civil tools rather than criminal tools.

2. We would be happy to meet with you or anyone you designate to go into this matter more deeply.

SIGNED
JOHN S. WARNER
Deputy General Counsel

Attachment

OGC:JSW:mks
Orig - DDS

✓ 1 - OGC Subject

REGULATIONS, AGENCY AND NON AGENCY

1 - Chrono.

SECRET

OGC 70-1744

15 October 1970

MEMORANDUM FOR THE RECORD

SUBJECT: Enforcement of Prohibition Against Employee Publications

25X1 []¹ The current secrecy agreement, which in accordance with [] is signed by all new employees, prohibits employees from publishing or participating in the publishing of any "material relating to the Agency, its activities or intelligence activities generally, either during or after the term" of the individuals employed by the Agency "without specific prior approval by the Agency". Earlier regulations and secrecy agreements, I believe, followed a similar pattern. Notwithstanding this arrangement, at least one former employee has published an article concerning classified CIA activities and on at least one other occasion the Agency has been concerned that a former employee was going to publish. It is believed the Agency's ability to actually prevent, as distinguished from merely prohibit, publication might be enhanced by adding to the secrecy agreement a provision whereby the employee assigns to the Government any royalties or money due him from publication in violation of the secrecy agreement. A provision such as the following could be used:

I agree that I will not write or publish, or agree to write or publish, or assist in the writing or publishing of, any story, article, book or other work, either factual or fictional, or prepare or deliver a public speech or talk, either factual or fictional, or appear on any radio, television, film or tape program, which in any way is based on knowledge or information obtained from my employment with CIA and involves or has to do with CIA or its operations, programs, organization,

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structure or personnel, or with any intelligence agency or activity of the United States, without the prior approval of CIA. Further, if I should take any action in violation of this paragraph, or agree or threaten to take any action in violation, I hereby assign to the United States Government all rights and interests in all royalties and other monies which may be due me therefrom and I authorize and direct that any such royalties and monies be paid over to the United States Government by the publisher or other person or organization from whom they are due.

2. Inclusion of language such as the above might be effective by any of three ways:

a. The employee or former employee might refrain from publishing not because he has so promised or because the regulation so requires, but because he would not make money by publishing.

b. A prospective publisher might decline to publish either out of a sense of cooperation and patriotism or from a desire to avoid any dispute over payment of royalties.

c. If neither the former employee nor the prospective publisher is willing to forego publishing, it might be that in litigation an injunction could be obtained directing them not to publish.

No court decisions enforcing such a provision are known to exist. Also, there might be some problems in trying a case while also protecting the classified information. Nevertheless, use of such a provision would seem beneficial. The problems of protecting information during trial doubtless could be handled in nearly every instance. Courts have attached significance to the fact that an employee or former employee had signed a secrecy agreement. And court decisions in enforcing trade secrets suggest that there would be some chance of success in obtaining an injunction.

[Redacted Signature]

Associate General Counsel

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